RECORD AND BRIEFS

Supreme Court, U.S.
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No. 13-339

In The Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE AMERICAN CHEMISTRY COUNCIL, THE AMERICAN COATINGS ASSOCIATION, THE AMERICAN PETROLEUM INSTITUTE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE PRECISION MACHINED PRODUCTS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the preemption provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9658, applies to state statutes of repose in addition to state statutes of limitations.

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INTEREST OF *AMICI CURIAE*

Amici trade associations represent a vast array of businesses and industries whose success depends on the stability provided by the rule of law. *Amici*'s members invest heavily in the economy and generate employment and growth for their local communities and throughout the Nation. *Amici* and their members have an interest in the outcome of this case because state statutes of repose play an important role in providing the stability and predictability necessary to foster economic growth and opportunity.[1]

The **American Chemistry Council** (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $770 billion enterprise and a key element of the nation's economy. It is one of the

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[1] Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation or submission of this brief. *Amici* file this brief with the written consent of all parties, copies of which are on file in the Clerk's Office.

nation's largest exporters, accounting for 12 percent of all U.S. exports.

The **American Coatings Association, Inc.** (ACA) is a non-profit trade association representing some 300 members who manufacture, supply, and distribute paint and coatings products and their applications. Many members have been involved since its passage in CERCLA enforcement and contribution actions, and the association has been engaged historically in advocacy that has resulted in streamlining the law's key provisions and their administrative implementation to help improve its fairness and efficiency in furtherance of its objectives.

The **American Petroleum Institute** (API) is a national trade association representing over 550 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API's members support more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, those members have invested nearly $2 trillion in U.S. capital projects to advance all forms of energy, including alternative sources. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers.

The **National Association of Manufacturers** (NAM) is the largest manufacturing association in

the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **Precision Machined Products Association** (PMPA) is a national trade association representing over 440 member companies involved in the production of highly engineered, precision machined components used in advanced automotive, aerospace, electrical, construction, and medical technologies. PMPA's members include metal producers, machining and manufacturing companies, machine tool builders, and producers of tooling, accessories, and metalworking fluids. The precision machining industry is best described by NAICS code 332721, and accounts for over 78,070 jobs with payrolls of $3.6 billion and shipments of over $13.3 billion. The mission of the PMPA is to provide the information, resources and networking opportunities to advance and sustain its members while advocating for manufacturing throughout the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

By failing to appreciate the difference between statutes of repose and statutes of limitation, the court of appeals impermissibly expanded the plain text of 42 U.S.C. § 9658 (CERCLA § 309) to preempt state statutes of repose in addition to statutes of limitation. Properly understood, statutes of repose do not cut off the remedy as a statute of limitation does. Statutes of repose abolish the cause of action altogether. *Burlington N. & Santa Fe Ry. Co.* v. *Poole Chem. Co.*, 419 F.3d 355, 363 (5th Cir. 2005). This means that instead of being procedural rules, statutes of repose are substantive laws. See Pet. Br. 21-22 (explaining that statutes of limitations are "procedural, in that they are designed to encourage litigants to assert their rights promptly," while statutes of repose "demarcate the existence of tort liability" and thus are substantive). The panel majority's overbroad reading of CERCLA thus unwittingly created a situation in which Congress is effectively dictating to the states the content of their substantive laws.

That error is magnified when one considers the history and purpose of statutes of repose. As to history, during the 1950s and 1960s, tort liability was dramatically expanded through a variety of mechanisms, including the discovery rule, the imposition of strict liability, and the abandonment of privity requirements. See Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 587 (1981);

Dean Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791-99 (1966). In the wake of those changes—which exponentially increased tort liability across the board—virtually all states enacted one or more statutes of repose to restore at least a measure of finality and predictability as to potential liabilities. McGovern, *supra* at 580; Andrew R. Turner, *The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability*, 46 J. AIR L. & COM. 449, 455 (1981). Finality and predictability, in turn, are crucial to states' efforts to expand their economies and provide employment opportunities to their citizens by creating a legal environment in which businesses can flourish.

As to purpose, statutes of repose have been instrumental in states' efforts to create, enhance, and protect their citizens' economic opportunities. States across the Nation have enacted them as part of broader efforts to strengthen their economies—an effort that is all the more important in the current economic environment. Each repose statute represents a policy choice by that state about the balance it wishes to strike among a variety of competing public policy goals. Congress had sound reasons not to disturb those policy choices.

To begin, statutes of repose serve to reinforce the tort law theories under which we normally hold actors liable. Although the primary goal of the law in this area is to promote reasonable conduct, perpetual liability creates situations where companies would be

incentivized to act unreasonably in an attempt to avoid liability. Manufacturers might decide not to make useful products altogether or they might be deterred from making safety modifications to products that could later be used as evidence in a tort suit for a heightened standard of care. Statutes of repose help avoid that unfortunate result. And states also use the statutes to limit stale claims, promote judicial economy, and help control insurance costs (another area of state power). Repose statutes thus provide a measure of certainty for the public in administering commercial transactions.

What is more, the court of appeals' departure from the plain text of CERCLA § 309 has the potential for much unintended mischief. Given its apparent applicability to much garden-variety private tort litigation, Section 309 could preserve lawsuits in any area—even far outside the environmental context—that happen to involve anything that could be considered a "hazardous substance" under CERCLA. This accidental abolition of state statutes of repose would alter state substantive law and destroy the balance struck by many states to help ensure economic opportunity and employment for their citizens. Congress did not intend that result, and the plain text of § 309 prohibits it. The decision of the court of appeals should be reversed.

ARGUMENT

If the court of appeals' decision is permitted to stand, businesses will not be able to rely on the traditional statutes of repose offered under state law to defend against a wide range of tort claims. The Court should reject that result for several reasons.

I. The History And Purpose Of Statutes Of Repose Confirm That Unlike Statutes Of Limitation, They Are Substantive Laws, Not Procedural Rules

Statutes of repose represent important policy choices made by states. They were passed to counteract the effects of changes in law, such as the discovery rule, that would otherwise create perpetual liability. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971). The history and purpose of statutes of repose confirm they are substantive tort laws, not procedural rules—and thus very different from the statutes of limitation expressly preempted by CERCLA § 309.

Statutes of repose are an important part of state tort law because they ensure that designers and manufacturers do not face perverse disincentives to market or improve their products. This makes repose statutes just as much a substantive component of a state's tort law as the standard of proof that a plaintiff must adduce at trial to show liability.

A. Like Other Substantive Components Of State Tort Law, Statutes Of Repose Help Ensure That Designers And Manufacturers Can Operate In A Manner That A State Deems Reasonable

Although CERCLA is a strict-liability statute, the tort suits brought by individuals based on exposure to "hazardous substances" are typically actions sounding in nuisance or negligence. Statutes of repose are an indispensable aspect of this system that seeks to promote reasonable conduct.

Tort law encourages actors to conduct their affairs in a reasonable manner—and the legal system assigns fault when actors fail to do so. Fault can only be assigned, however, if one party owes a duty to another. *Palsgraf* v. *Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928). And so while "the manufacturer of [a] thing of danger is under a duty to make it carefully," *MacPherson* v. *Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916), the law limits liability where reasonable steps are taken by the manufacturer to ensure safety.

Statutes of repose reinforce this system. For example, "[t]he underlying theory of a statute of repose posits that after a reasonable period of operating without injury or accident, the law deems a product carefully designed and manufactured." James F. Rodriguez, Note, *Tort Reform & GARA: Is Repose Incompatible with Safety?*, 47 ARIZ. L. REV. 577, 581 (2005) (emphasis omitted). Thus if a product does not

cause injury during the period before repose, it will have met the state's conditions for reasonableness. *Ibid.*

Without statutes of repose, however, perpetual liability would threaten to seriously undermine a state's tort regime. For one thing, manufacturers could be disincentivized from making safer and more efficient products. Josephine Herring Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 633 (1985). Changes to products constantly update the standard of care with which a manufacturer must act. Without repose, the threat of a plaintiff offering evidence of design changes against the maker could discourage innovation—especially with regard to safety. *Ibid.*

The threat of perpetual liability could also lead to over-deterrence. Consider the cost-benefit analysis that always takes place in a product's design and manufacturing stage as well as in the governance of its operations (i.e., why we do not force car manufacturers to limit vehicle engines to 25 or 50 horsepower and thus eliminate fatal high-speed accidents completely). States fold these policy considerations directly into their substantive tort law.

Absent a statute of repose, however, there might be a product or activity that a state finds particularly useful but that companies facing perpetual liability are simply unable or unwilling to make. Or perhaps the long-term insurance costs might cause a manufacturer to spend more resources in developing a product than is optimal for the state's goals. For example,

states do not want architects calling for titanium walls in houses just to make sure they never collapse from termites. Such over-deterrence drives away businesses and citizens alike.

This reasoning was behind the support for statutes of repose that followed expansion of tort liability in the 1950s and 1960s. In particular, the discovery rule—a statute of limitations does not begin running until an injury is or should have been discovered—exposed manufacturers to virtually open-ended liability. Turner, *supra*, at 456. This made statutes of limitation procedural rather than substantive because it focused on the individual's diligent prosecution of an injury. To counter that, many states passed statutes of repose and the U.S. Department of Commerce even promulgated a model uniform act containing such a statute. *Id.* at 456-57 (citing UPLA, § 110(b), 44 Fed. Reg. 62,732 (1979)).

Statutes of repose thus play an important role in state tort law by allowing designers and manufacturers to act in a manner that the state deems reasonable. These statutes are just as much a substantive component of a state's tort law as the standard of proof that a plaintiff must adduce at trial to show liability—further illustrating why Congress would not have intruded into this area.

B. Other Salutary Purposes Served By Statutes Of Repose Further Confirm The Important Role They Play In Substantive State Tort Law

Besides reinforcing the reasonableness determination traditionally left to the states, statutes of repose provide other benefits that further demonstrate why they are substantive, not procedural (and thus very different from the statutes of limitation expressly preempted by § 309). See *Sch. Bd. of City of Norfolk* v. *U.S. Gypsum Co.*, 360 S.E.2d 325, 328 (Va. 1987) ("[A statute of repose] is intended as a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights." (citation and internal quotation marks omitted)).

First, states achieve the public good of certainty and finality in the administration of commercial transactions through repose statutes. States have long recognized the need to protect sources of jobs and tax revenue from protracted and extended vulnerability to lawsuits. See *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 54 A.3d 1005, 1024 (Conn. 2012) ("[S]tatutes of repose reflect legislative decisions that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability." (citation and internal quotation marks omitted)).

Second, statutes of repose promote judicial economy. They affect not only the sheer number of cases

that state courts must hear, but also the quality of those cases, by impeding stale claims where it may be difficult for a business to defend (or a plaintiff to prosecute) because of lost records or faded memories. *Craven* v. *Lowndes Cnty. Hosp. Auth.*, 437 S.E.2d 308, 310 (Ga. 1993) (concluding that statutes of repose serve a legitimate state interest in protecting against stale claims). Judicial efficiency is undermined when those obstacles are removed and stale claims are facilitated.

Statutes of repose further improve judicial economy by focusing plaintiffs on the liable parties and not on original manufacturers who may be innocent regarding the injury (but are perhaps perceived as having "deep pockets" for recovery purposes). One example can be found in the aircraft industry. "NTSB data indicates any aircraft accident is far more likely to be due to pilot error, weather, or a maintenance problem than a design defect." Rodriguez, *supra*, at 598 (citing H.R. Rep. No. 103-525(I), at 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638 ("NTSB data shows only 1% of general aviation accidents are caused by design or manufacturing defects.")). The cases seem to indicate, though, that manufacturers are more likely to be the primary target in a lawsuit. *Id.* at 597-98. A statute of repose, however, can prevent the needless waste of time and judicial resources spent on fishing expeditions or *in terrorem* settlement attempts. See, e.g., *Eastin* v. *Broomfield*, 570 P.2d 744, 751 (Ariz. 1977) (holding that segregating meritorious claims from frivolous ones is a legitimate

state interest); *Renner* v. *Edwards*, 475 P.2d 530, 532 (Idaho 1969) (noting that statutes of repose are designed to promote stability and prevent fraudulent claims).

Third, states use statutes of repose to lower insurance rates—another traditional area of state interest. The statutes can "help control runaway insurance costs" because, "[i]n the absence of statutes of repose, insurers must maintain reserves to cover potential claims for several years, if not decades, into the future." *Sun Valley Water Beds of Utah, Inc.* v. *Herm Hughes & Son, Inc.*, 782 P.2d 188, 189 (Utah 1989); see also *Harlfinger* v. *Martin*, 754 N.E.2d 63, 69 (Mass. 2001) ("The statute of repose at issue here was passed as part of a larger, long-term effort to curb the cost of medical malpractice insurance and keep such insurance available and affordable."); Charlotte E. Thomas, Note, *People Who Live in Glass Houses Should Not Build in Vermont: The Need for a Statute of Limitations for Architects*, 9 VT. L. REV. 101, 130 (1984) (discussing insurance problems facing architects in particular).

As insurance rates go up, businesses produce less taxable income and are unable to invest as heavily in the economy. See *Kenyon* v. *Hammer*, 688 P.2d 961, 976 (Ariz. 1984). There may also be long-term effects on families' decisions to stay in one locale over another because insurance costs are passed on to consumers in the form of higher prices and can drive away potential residents for that reason. See G. SULLIVAN, PRODUCTS LIABILITY: WHO NEEDS IT? 16 (1979). Repose statutes, on the other hand, lead to more stability in

this area "and thus provide greater actuarial precision in setting insurance rates." Hicks, *supra*, at 632-33. This, in turn, "facilitate[s] efficient business planning and ultimately benefit[s] businessmen, professionals, consumers, and the economy." *Ibid.*

In sum, repose statutes are vehicles for a state to achieve various policy objectives in its substantive law by cutting off various categories of potential claims. At present, virtually every state has enacted at least one statute of repose, and some have adopted several for different categories of potential claims. See Francis P. Manchisi & Lorraine E.J. Gallagher, *A nationwide survey of statutes of repose*, http://www.wilsonelser.com/files/repository/NatlSurveyRepose_March2006.pdf.

These experiments in the laboratories of the states are exactly what Madison and the Framers envisioned. See James Madison to the Members of the First Congress, 2 Annals of Cong. 1897 (1791) ("Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it * * * * *"). Within their realms of sovereignty, states control what is and is not a tort. Congress did not override that prerogative here, as the text of § 309 makes plain.

II. If Permitted To Stand, The Court Of Appeals' Construction Of CERCLA § 309 Will Have Serious Unintended Consequences For A Wide Range Of Tort Litigation

Section 309 applies to a vast range of state tort actions because CERCLA's definition of "hazardous substance" is extremely broad. 42 U.S.C. § 9601(14). That definition includes hundreds of substances that EPA has regulated under other environmental statutes. Even common household items such as copper, nickel, and ammonia are classified by law as CERCLA "hazardous substances" because EPA regulates them in certain situations under the Clean Water Act. 40 C.F.R. § 302.4 (2012). Moreover, these materials are CERCLA "hazardous substances" at all times and in all places, regardless of their quantity, concentration, bioavailability (i.e., the ease with which it can make its way through the environment), or any other actual properties. Status as a CERCLA "hazardous substance" thus does not reflect the reality of how a substance is present at any particular time or place.

For example, EPA regulates effluent discharges containing copper under the Clean Water Act out of concerns about its aquatic toxicity. See 40 C.F.R. § 302.4. Yet any amount of copper released into the air from any facility in any form is automatically a CERCLA "hazardous substance" to which § 309 applies.

Furthermore, Section 309 is not limited to state tort actions grounded in exposure to CERCLA "hazardous substances." It governs all tort claims "for personal injury, or property damages, which are caused *or contributed to* by exposure to any hazardous substance * * * released into the environment from a facility." 42 U.S.C. § 9658(a)(1) (emphasis added). Thus, for example, a garden-variety property-damage claim in which alleged exposure to copper plays even a minor contributing role will trigger the federally mandated commencement date in lieu of state law.

If permitted to stand, the court of appeals' expansion of § 309's plain text to reach not only state statutes of limitation (which are procedural) but also state statutes of repose (which are substantive) will have serious ramifications on state tort law far beyond the context of environmental litigation—inadvertently upsetting the balance states have struck among competing interests, goals, and priorities in their substantive tort laws. This accidental abolition of state statutes of repose runs up against the problems discussed in Part I, *supra*. It alters state substantive law and threatens the efforts states have undertaken to improve their economies and the opportunities available to their citizens. Congress did not go so far. The plain text of the statute should control, and the decision below should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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